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NO. 87-340

UNITED STATES SUPREME COURT

1987 TERM

GERALD W. WYANT,
APPELLANT

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and BOROUGH OF NEWRY,
APPELLEES

On Appeal From The Supreme Court
Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI (TREATING APPELLANT'S JURISDICTIONAL STATEMENT AS A PETITION FOR CERTIORARI)

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COUNTERSTATEMENT OF THE CASE

In November, 1983, the Borough of Newry (the "Borough") adopted a revision to its official sewage facilities plan that provided for the construction of a new sewage treatment plant at an unspecified location (the "Revision"). (Appellant's Jurisdictional Statement [hereinafter J.S.] at 9.) A revision to an official plan must be approved under Pennsylvania law by the Department of Environmental Resources ("DER"). Notice that the Revision had been submitted by the Borough to DER for its review and approval was published in the Pennsylvania Bulletin on December 10, 1983. (J.S. 11.)

On January 14, 1984, DER approved the Revision and published notice of the approval in the Pennsylvania Bulletin. (J.S. 12.) Under Sections 904 and 906 of the Commonwealth Documents Law, 45 Pa. C.S.

§§904, 906, publication in the Bulletin constituted sufficient notice to all persons potentially affected by the governmental action. Any person adversely affected by the Revision then had thirty days within which to file an appeal before the Environmental Hearing Board. 71 P.S. §510-21(e); 25 Pa. Code §21.52; Rostosky v. Cmwlth. of Pa., DER, 26 Pa. Commw. 478, 364 A.2d 761, 763 (1976).

The Appellant, George W. Wyant ("Wyant"), owns property near the Borough. Despite the two public notices, Wyant did not file a timely appeal from DER's approval of the Revision.

It was not until eleven months later that Wyant attempted to file an appeal from the DER's approval of the Revision. (J.S. A-18.) Because there was no question that the thirty-day statutory deadline for appeals had passed, Wyant asked the Envi-

ronmental Hearing Board for permission to file an appeal from the approval of the Revision nunc pro tunc. (J.S. A-54.) It is important to note that Wyant did not challenge the statutory scheme itself. To the contrary, Wyant merely asserted that the notice he had received was deficient under state law. Further, Wyant offered no evidence that the Revision actually affected his property. (J.S. A-20.)

An appeal to the Environmental Hearing Board is only permitted nunc pro tunc for good cause shown, such as a showing that the appellant has been a victim of fraud or some breakdown in the operation of the Board. 25 Pa. Code §21.53; Twp. of Franklin v. Cmwlth. of Pa., DER, 2 Pa. Commw. 496, 276 A.2d 549, 551 (1971). Wyant failed to make such a showing, and the Board dismissed his appeal.

Wyant appealed the Board's ruling to the Pennsylvania Commonwealth Court. Again, Wyant did not challenge the constitutionality of any state statutes or regulations. He did not assert that the thirty-day appeal period or any other procedural requirements were invalid. He merely argued that he had failed to receive proper notice pursuant to the admittedly valid state statutory scheme. Thus, the only question before the Court was whether the Environmental Hearing Board had abused its discretion in refusing to allow an appeal nunc pro tunc because of the allegedly insufficient notice. The Court affirmed the Board's dismissal of the appeal, and held that Wyant had received proper notice under the applicable Pennsylvania statutes. (J.S. A-19.) The Pennsylvania Supreme Court declined review (J.S. A-3), and this appeal followed.

In order to operate a municipal sewage treatment plant, a Pennsylvania municipality must not only revise its official plan to provide for the plant in a general way, it must also apply for and receive a National Pollution Discharge Elimination System Permit and a Water Quality Management Permit. The Borough applied for and received those permits. At the same time Wyant sought permission to appeal from the approval of the Revision nunc pro tunc, he also appealed from the issuance of those permits. (J.S. A-53 - A-55.) This portion of the appeal was not dismissed and, in fact, proceeded to a full evidentiary hearing and is still ongoing.

SUMMARY OF ARGUMENT

This case is not within the Court's jurisdiction as a direct appeal because Wyant does not challenge, and has never challenged, the constitutionality of any Pennsylvania statutes. The jurisdictional statement must therefore be treated as a petition for certiorari.

The petition for certiorari should be denied. First, Wyant merely asserts that he received inadequate notice under the relevant state statutes. Thus, no federal question is presented. Second, even assuming the existence of a federal question, no special or important reasons compel the acceptance of review. For example, the case does not involve review of a constitutional standard or principle, merely the application of long-standing rules to a particular set of facts. Finally, a decision could be rendered moot

by state proceedings that are ongoing as of this writing.

ARGUMENT

I. THIS CASE DOES NOT FALL WITHIN THIS COURT'S JURISDICTION OVER DIRECT APPEALS

Wyant seeks review by appeal pursuant to 28 U.S.C. §1257(2). Wyant "admits that he hesitated before concluding that this case was reviewable here by appeal...." (J.S. 31.) Wyant's hesitation is well-founded. By Wyant's own admission, he "refrained from explicitly attacking" any state statutes or regulations below. Id. Even in his jurisdictional statement, Wyant does not challenge the constitutionality of the Pennsylvania Sewage Facilities Act, Administrative Code, Administrative Agency Law, Commonwealth Documents Law, or any other Pennsylvania statute or regulation. Rather, Wyant merely asserts that, given the way the laws were applied in his particular circumstances, he was deprived of due process of law. Because Wyant admit-

tedly has not challenged the constitutionality of any state statutes, review by appeal is not available under §1257(2). That section authorizes appeals only in cases where a state statute is challenged as "repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. §1257(2). It follows that the appeal should be dismissed, and the jurisdictional statement must be treated as a petition for certiorari. 28 U.S.C. §2103; Fornaris v. Ridge Tool Co., 400 U.S. 41, 44, 91 S. Ct. 156, 157 n.1 (1970).

II. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE NO FEDERAL QUESTION HAS BEEN PRESENTED

The Court should deny the petition for certiorari because no federal question has been presented. See Webb v. Webb, 451 U.S. 493, 500-01, 101 S. Ct. 1880, 1894 (1981).

From the very commencement of this litigation, Wyant has based his claim solely upon an assertion that the notice he received was deficient under the state statutory scheme. By his own admission, Wyant has never attacked the constitutionality of the statutes themselves. (J.S. 31.) Instead, he has argued that, under state law, the Pennsylvania court should have interpreted the term "party" in the applicable statutes more broadly. (J.S. 32.) He has argued that, contrary to state law, there was no publication in a local newspaper, or no posting of signs near the proposed site. Wyant has argued that the state statutes were violated because he was not provided with personal notice by letter or messenger. The arguments are state law arguments. Wyant's contention that notice was improper under state law -- the only contention he presents here -- is simply

not a federal question. See In re Kemmler, 136 U.S. 436, 10 S. Ct. 930, 934 (1890) (decision on questions of compliance with state statute does not involve a federal question). Accordingly, the petition for certiorari should be denied.

III. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING CERTIORARI

Assuming arguendo that the Pennsylvania courts decided a federal question, the question is neither special and important nor substantial. Nor is it novel or likely to recur. Wyant admits that, at best "[t]his case involves straightforward and well-settled Federal principles of procedural due process...." (J.S. 30.) Therefore, the petition should be denied. Sup. Ct. R. 17; Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S. Ct. 614, 616 (1955).

Wyant's sole contention is that he did not receive adequate notice under the particular circumstances presented here. The constitutional standards regarding proper notice are clear and well-established, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 (1950), and Wyant does not seek to change them. Giving Wyant's jurisdictional statement every conceivable benefit of the doubt, he does nothing more than ask this Court to review how the state courts have applied those standards to a particular set of facts. This is hardly the sort of matter that merits the Court's attention.

Furthermore, a decision in this case could not possibly have broad impact or significant precedential value. The question presented here is whether prior publication in the state's gazette in accordance with state law constitutes adequate notice

to a landowner whose property may or may not be affected by a revision to a municipality's official sewage plan. This is obviously not the sort of question whose resolution promises far-reaching guidance and direction. The issue is more episodic and academic than of potentially recurring importance. In short, there is no particular reason to devote the Court's limited resources to a resolution of this case, and certiorari should be denied.

IV. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE WYANT HAS FAILED TO EXHAUST HIS STATE REMEDIES

There is a very real possibility that the issues presented in this case may be mooted or otherwise affected by ongoing state proceedings already in progress. Therefore, review by certiorari at this time would be highly inappropriate. Minnick v. Cal. Dep't of Corrections, 452

U.S. 105, 121-22, 101 S. Ct. 2211, 2220 (1981).

As previously noted, in order to operate a municipal sewage treatment plant, a Pennsylvania municipality must not only revise its official plan to provide for the plant in a general way, it must also apply for and receive a National Pollution Discharge Elimination System Permit and a Water Quality Management Permit. The DER approved the Borough's applications for these permits, and published notification of the approvals in the Pennsylvania Bulletin on November 17, 1984. (J.S. 19.) Pointedly, based upon that notice, Wyant did file a timely appeal from those approvals before the Environmental Hearing Board. That appeal resulted in a lengthy hearing on the merits and a final adjudication is expected shortly. Accordingly, Wyant has already had notice and a hearing

on the issue of whether a sewage plant on his property should receive a permit. If Wyant's appeal is sustained, the Borough will not be able to proceed with its treatment plant as planned. If that happens, a decision in the instant matter would be rendered meaningless, and this Court will have issued an essentially advisory opinion.

Further, the Borough is still required to go through condemnation proceedings in order to locate the plant on Wyant's property. (J.S. 29, 44.) To the extent the issues have not been barred by collateral estoppel by that time, Wyant will be able to challenge the condemnation in those proceedings. See Section 406 of the Pennsylvania Eminent Domain Code, 26 P.S. §1-406. Again, if Wyant prevails, a decision by this Court in the instant matter will have been entirely unnecessary. Given

the ongoing proceedings before state courts and administrative agencies, there is no reason for this Court to grant certiorari.

CONCLUSION

For all of the reasons set forth above, Wyant's appeal should be DISMISSED and, treating the jurisdictional statement as a petition for certiorari, the petition should be DENIED.

Respectfully submitted,

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By _____

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DATED: September 24, 1987

CERTIFICATE OF SERVICE

AND NOW, on this 24th day of September, 1987, I hereby certify that I have served a true and correct copy of the foregoing Brief in Opposition to Petition for Certiorari (Treating Appellant's Jurisdictional Statement as a Petition for Certiorari) upon those persons listed below by mailing the same by first-class United States mail, postage prepaid.

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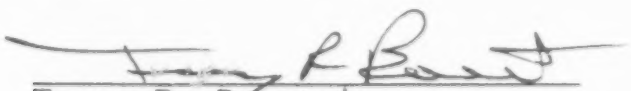

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